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IN THE

Supreme Court of the United States

Term, 196

No. 738

CHARLES TRAVITZKY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CHARLES TRAVITZKY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, by and through counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, confirming the judgment of the United States District Court for the Southern District of Florida, Miami Division, convicting petitioner and providing a sentence of imprisonment.

OPINION BELOW

The opinion of the Court of Appeals, set forth in Appendix A, *infra* App. 1, has not yet been reported. Petition for rehearing was denied without opinion. The District Court gave no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1963; petition for re-hearing in that Court was denied without opinion on December 10, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Rule 19 of the U. S. Supreme Court Rules, 1.(b)

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . ."

QUESTION PRESENTED

WHETHER THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN THE INSTANT CASE IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER, TO-WIT, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, RITTERMAN V. U. S., 12 F. 2d 849, AND UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, WONG BING NUNG V. U. S., 221 F. 2d 917.

STATUTE INVOLVED

18 U.S.C. 545 provides in pertinent part as follows:

> "Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, . . . or
>
> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, . . .

Shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

"

STATEMENT OF PROCEEDINGS

The petitioner was apprehended in customs at Miami International Airport, Miami, Florida, on January 10, 1962. He had certain diamonds concealed on his person. His luggage was searched; he was disrobed; an inspection of his body cavity was made. A foreign substance appeared to be contained therein. After repeated questioning and threats of sending for a doctor and taking X-rays, the petitioner disgorged diamonds and delivered them over to the customs officials. At no time prior to the delivery of the diamonds had the petitioner crossed the customs barrier.

REASONS FOR GRANTING THE WRIT

On a similar set of facts the United States Court of Appeals for the Second Circuit in the case of *Ritterman* v. *U. S.*, 12 F. 2d 849 (C.A. 2nd 1926), held that the act of smuggling had not been completed and that the act of clandestinely introducing merchandise had not been completed, and reversed the District Court's conviction.

Even though this Supreme Court reversed the Court of Appeals, *U. S.* v. *Ritterman*, 47 S. Ct, 371 (1927), there is yet a valid distinction in that Ritterman had, on one occasion immediately prior to the time he was apprehended in Vermont, *by-passed a United States customs officer in Montreal, successfully carrying merchandise inside the land boundaries of the United States.* (N.B. Justice Holmes himself indicated in the Ritterman decison at page 372 that had the merchandise "been carried across the boundary in such a way as to avoid

a port of entry, . . . *the offense of smuggling would have been complete when they (the contraband) passed the line.* . . .")

Petitioner would like to point out to the Court that in the District Court of Connecticut, *The J. Duffy*, 14 F. 2d 426, (1926), the Court held that the Statute in question, (being the same Statute involved in the instant case), did not apply until the goods has passed the customs barrier.

In the United States Court of Appeals for the Ninth Circuit, *McGill* v. *U. S.*, 28 F. 2d 572 (1928), it was held that the mere bringing of contraband within the three mile limit did not complete the offense of "smuggling".

In the District Court of New York, *U. S.* v. 646 *Half Boxes of Figs*, 164 F. 778 (1928), it was held that the provision making it a crime to "smuggle or clandestinely introduce" merchandise into the United States did *not* include a case where merchandise was fraudulently entered at the customs house.

Contra to the above, we find the District Court of Tennessee, *U. S.* v. 36 *Cases of Intoxicating Liquor*, 281 F. 243 (1922), holding that the offense of smuggling was completed when the goods were brought within the territorial waters of the United States, even though not unloaded.

So too in the case of *Newman* v. *U. S.*, 276 F. 798, (1921), the United States Court of Appeals in New York, the declaration had been given to the inspector. Newman, in response to a query, had stated that he had declared everything. He was searched. Diamonds were found hidden on his person. The court held that the act of smuggling had been completed even though Newman had not left the customs enclosure.

And in *Rogers* v. *U. S.*, 180 F. 54 (1910) the Michigan Court held Rogers guilty by avoiding the first opportunity given to make a customs declaration.

Petitioner respectfully suggests that the decision of the United States Court of Appeals for the Second Circuit as reported in *Ritterman* v. *U. S.*, 12 F. 2d 849 was the correct one. This point of view is more aptly stated in the case of *Wong Bing Nung* v. *U. S.*, (9th Cir. 1955), 221 F. 2d 917. In a very well written decision Chief Judge Denman pointed out that "the leading case which defines the terms 'smuggling' and 'clandestinely introduce' is *Keck* v. *U. S.*, 19 S. Ct. 254. In the Keck case goods were seized aboard a vessel in an American port, merchandise not having been unladen. The Supreme Court, called upon to interpret Sec. 545, 18 U.S.C. held that smuggle and clandestinely introduce were synonymous phrases, and that goods must actually be brought across the customs line in order to be smuggled.

This Court in a case identical with the instant appeal, following the *Keck* case, held that there had not been any smuggling. *McGill* v. *U. S.*, 28 F. 2d 572 (1928).

Later the Supreme Court clearly established that smuggling could occur by one who evaded a customs house by successfully carrying merchandise inside the land boundaries of the country, but this was implicit in the *Keck* case.

(N.B. This language appears in the *Wong Bing Nung*, *supra* decision at page 99. *U. S.* v. *Ritterman*, 47 S. Ct. 371.).

It would seem that the reasoning in the Second Circuit and Ninth Circuit lends itself to more logical credence, if we look at customs officers in their true light, to-wit, as tax collectors. It is true that one may attempt to commit a crime or to

avoid the payment of a tax, but if the attempt is thwarted by the proper acts of an officer of the Government who thus prevents a crime from being committed, how then can we say that the defendant, in attempting to and intending to commit a crime, has actually committed a crime. It is true that the Defendant may thus be found guilty of attempting to commit a crime, but the Statute in question does not make it illegal to *attempt* to smuggle or clandestinely introduce any merchandise which should have been invoiced, nor does it make it illegal to *attempt* to fraudulently or knowingly import or bring into the United States any merchandise contrary to law.

In the instant case the defendant may have intended to smuggle or clandestinely introduce diamonds into the United States, or he may have intended to fraudulently or knowingly import or bring into the United States these diamonds contrary to law. However, the fact remains that owing to competent official action on the part of the customs officers, these diamonds were not smuggled or clandestinely introduced, or fraudulently or knowingly imported or brought into the United States contrary to law. Ergo, the defendant did not commit the crime proscribed by Sec. 545, 18 U.S.C.

CONCLUSION

In view of the direct conflict between the decision of the United States Court of Appeals for the Fifth Circuit in the instant case and those of the Second and Ninth Circuits in the above cited cases, Petitioner humbly requests this Court to re-consider its decision in the U. S. v. Ritterman case reported at 47 S. Ct. 371, and re-affirm the holdings of the Second Circuit Court of Appeals in *Ritterman* v. *U. S.*, 12 F. 2d 849, and the Ninth Circuit Court of Appeals in *Wong Bing Nung* v. *U. S.* 221 F. 2d 917, and grant this Petition for Writ of Certiorari accordingly.

Respectfully submittted,

KESSLER & GARS
Attorneys for Petitioner

By_____
Of Counsel

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

No. 20221

CHARLES TRAVITZKY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

(October 15, 1963)

Before CAMERON, WISDOM and GEWIN, Circuit Judges.

PER CURIAM: The defendant Travitsky was found guilty by a jury of violating Title 18 U.S.C.A. Section 545. There were three Counts in the indictment but Count III was dismissed, and the defendant was tried under Counts I and II. Numerous errors are specified but the chief one relates to the following: (a) the admissibility of prior suspicious conduct as bearing on the state of mind of the defendant; (b) instructions of the court as to the elements of the offense charged; and (c) the instruction of the court to the jury to disregard Count III of the indictment because it had been dismissed.

We have carefully reviewed the record and considered the numerous errors claimed, including those specifically men-

tioned above. We conclude that the defendant had a fair trial and that the alleged errors are without substance. Babb v. U. S., 252 F. 2d 702; U. S. v. Ritterman, 273 U.S. 261, 71 L. Ed 636; Weiss v. U. S., 122 F. 2d 675 (C.A. 5th 1941) cert. den. 314 U. S. 687; Windisch v. U. S., 295 F. 2d 531 (C.A. 5th 1961).

The judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1962

D. C. Docket No. 147-62-M-Criminal

CHARLES TRAVITZKY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

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Before CAMERON, WISDOM and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 15, 1963

Issued as Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20221

CHARLES TRAVITZKY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

(December 10, 1963)

ON PETITION FOR REHEARING

Before CAMERON, WISDOM and GEWIN, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that each of the following has been served with two copies of the foregoing petition for writ of certiorari in the manner indicated, to-wit: The United States Attorney, by U. S. Mail, and the Solicitor General, U. S. Department of Justice, Washington 25, D. C., by U. S. Air Mail, postage prepaid.

Stephen F. Kessler

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CITATIONS

Cases:

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Hirabayashi v. *United States*, 320 U.S. 81 — 4

Keck v. *United States*, 172 U.S. 434 — 6

McGill v. *United States*, 28 F. 2d 572 — 6

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718-180—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 738

CHARLES TRAVITZKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1-2; R. 353-354) is reported at 322 F. 2d 1023.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1963 (Pet. App. 3; R. 355). A petition for rehearing (R. 357-366) was denied on December 10, 1963 (R. 367). The petition for a writ of certiorari was filed on January 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner committed the crime of smuggling in violation of 18 U.S.C. 545 where the diamonds he clandestinely introduced into the United States were discovered during customs inspection.

STATUTE INVOLVED

18 U.S.C. 545 provides in pertinent part:

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced * * *; or
>
> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

Following a jury trial held in the United States District Court for the Southern District of Florida, petitioner was convicted of violating 18 U.S.C. 545 (see *supra*), in that on or about January 10, 1962, he fraudulently and knowingly brought into the United States 248.93 carats of diamonds without declaring them to customs (count 1), and that he smuggled these same diamonds into the United States without invoicing them or paying the requisite duty (count 2) (R. 1, 24, 324, 326–327).[1] Petitioner was

[1] The third count of the indictment, charging an unlawful importation of gems on a later date, was dismissed before trial on motion of the government (R. 45).

sentenced to two years imprisonment on each count, the sentences to run concurrently (R. 32, 347). In a *per curiam* opinion, the court of appeals unanimously affirmed (Pet. App. 1-2; R. 353-354; 322 F. 2d 1023).

The evidence showed that petitioner returned to the United States from South America on January 10, 1962. During customs inspection, petitioner declared that he had returned with certain items of jewelry he had previously registered with the customs authorities and also with some liquor. Petitioner, who was a suspected diamond smuggler (R. 140, 142; 163–167), was asked a number of times by several customs inspectors if he had any other merchandise or jewelry to declare and he replied that he did not. (R. 58–63; 74–79; 100; 110, 113–116, 150, 196-198.) In petitioner's suitcase customs agents found, *inter alia*, an electric razor, a tube of lubricating jelly, a number of rubber "finger stalls",[2] and two styptic pencils, one of which was contained in a plastic tube. There was no container for the other styptic pencil. Petitioner explained that he had lost the other container and that he used these articles to prevent against and to remedy cuts (R. 81–83; 117–119; 147–150).

At this point, petitioner was asked to disrobe and a search of his clothing was conducted. One of the agents noticed a foreign substance lodged in petitioner's rectum and petitioner was asked to eject what was in his body. He refused. The supervising

[2] One of the agents explained that a finger staff was "a piece of rubber thicker than a balloon and something which would fit over a finger" (R. 81).

agent then went to get a doctor from the Public Health Service so that an internal examination of petitioner could be conducted. While he was gone, petitioner informed another agent that he had "some diamonds" secreted in his body. When the supervising agent returned, petitioner told him the same thing and, in the presence of two agents, removed from his rectum a plastic vial wrapped in rubber finger stalls coated with jelly. This vial continued a quantity of loose diamonds (R. 83–89; 120–121; 131; 151–156), weighing 248.93 carats (R. 180). Their domestic value was estimated at $47,330.00 and their foreign or export value at $22,700.00 (R. 183). The duty on these diamonds was $2,270.00 (R. 183).

ARGUMENT

Petitioner's sole argument is that he could not properly be convicted of smuggling or fraudulently bringing diamonds into the United States since such offenses would be complete only when the customs barrier was passed—whereas, in this case, the diamonds he had concealed in his rectum were declared by him and turned over to the customs authorities before the customs barrier was crossed. Petitioner's conviction of fraudulently bringing diamonds into the United States (count 1)—which wholly supports his two year sentence[3]—would not on any basis be subject to this kind of attack. See *Wong Bing Nung* v. *United States*, 221 F. 2d 917, 919-920 (C.A. 9); *Gillespie* v. *United States*, 13 F. 2d 736, 738 (C.A. 2),

[3] See *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642.

certiorari denied, 273 U.S. 730. His argument is in any event fully answered by this Court's decision in *United States* v. *Ritterman,* 273 U.S. 261. In that case, on facts essentially like those involved here,[4] this Court, speaking through Mr. Justice Holmes, rejected a similar claim observing (273 U.S. at 268):

> If they [the diamonds] had been carried across the boundary in such a way as to avoid a port of entry, we suppose that the offence of smuggling would have been complete when they passed the line, although the smuggler might repent and afterwards report for payment of duties. We perceive no difference because of the accident that the goods had to pass a customs house which the respondent's fraud had deprived of further function if it had not been found out.

Petitioner persisted in his concealment of the diamonds until it became obvious that the customs agents would find them. In these circumstances, his belated admission that he had gems does not relieve him of liability for smuggling. See *United States* v. *Ritterman, supra; Newman* v. *United States,* 276 Fed. 798,

[4] The facts of *Ritterman* reveal that, while in Montreal, Canada, the defendant purchased a railroad ticket for New York City. Before leaving, he brought his travelling bag to the United States customs office in Montreal for inspection. At that time, he told a customs inspector that his bag contained only his personal wearing apparel. An inspection of the bag did not reveal any jewelry. When petitioner arrived at the port of entry in Vermont, he told customs inspectors that he had no diamonds to declare. He was advised that the inspectors had information that he had diamonds with him. He was asked to undress for a search of his person and on demand turned over the key to his travelling bag. While undressing he admitted that the diamonds were in his bag.

800 (C.A. 2), certiorari denied, 258 U.S. 623; *Rogers* v. *United States*, 180 Fed. 54, 60 (C.A. 6); *United States* v. *218½ Carats Loose Emeralds*, 153 Fed. 643, 648 (S.D. N.Y.), affirmed on other grounds, 154 Fed. 839 (C.A. 2).[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

JANUARY 1964.

[5] The cases upon which petitioner relies are inapposite. They stand for the entirely different proposition announced by this Court in *Keck* v. *United States*, 172 U.S. 434, as construed in *Ritterman*, *supra*, 273 U.S. at 268, that the crime of smuggling is not complete as to ship-laden goods which, although they have passed into the territorial waters of the United States, have not been unloaded. See *e.g.*, *McGill* v. *United States*, 28 F. 2d 572 (C.A. 9); *Wong Bing Nung* v. *United States*, 221 F. 2d 917 (C.A. 9).

U.S. GOVERNMENT PRINTING OFFICE: 1964